(4)

FILED
JAN 5 1994
OFFICE OF THE CLERK

No. 93-659

In The

Supreme Court of the United States

October Term 1993

PHYLLIS MILLER,

Petitioner,

v.

DINO LA ROSA, et al.,

Respondents.

On Petition For Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

January 5, 1994

ROBERT D. LINKS*
DOBBS, BERGER, MOLINARI, VANNELLI, NADEL & LINKS
One Maritime Plaza, Suite 2500
San Francisco, CA 94111-3574
415-362-1940

Attorneys for Respondents

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

58 pp

QUESTIONS PRESENTED

Did the court of appeals have jurisdiction to entertain petitioner's appeal when there was no timely notice of appeal, no timely Rule 59 motion to extend the appellate filing deadline, and no statement or representation made by the district court which specifically misled petitioner that her appeal had been perfected?

Did the court of appeals correctly conclude, pursuant to the express language of the statute, that the proper defendant in a Title VII case is *the employer*, rather than the alleged victim's co-workers or supervisors?

TABLE OF CONTENTS

Page

Question Presented i

Jurisdiction 1

Statutory Provisions and Rules Involved 1

Statement of the Case 5

Reasons for Denying the Writ 11

I. CERTIORARI SHOULD BE DENIED BECAUSE THERE IS NO JURISDICTION TO CONSIDER PETITIONER'S APPEAL 13

A. PETITIONER DID NOT FILE A TIMELY NOTICE OF APPEAL PURSUANT TO FRAP 4. PETITIONER'S MOTION FOR RECONSIDERATION IN THE DISTRICT COURT, EVEN IF DEEMED A MOTION FOR NEW TRIAL UNDER FRCivP 59, WAS NOT TIMELY, AND THEREFORE DID NOT EXTEND OR ENLARGE THE TIME LIMIT FOR FILING A NOTICE OF APPEAL 13

B. THE NINTH CIRCUIT MISAPPLIED THE "UNIQUE CIRCUMSTANCES" DOCTRINE OF *THOMPSON v. IMMIGRATION SERVICE*. PURSUANT TO *OSTERNECK v. ERNST & WHINNEY*, 489 US 169 (1989), A LATE NOTICE OF APPEAL IS EXCUSED ONLY WHERE THE DISTRICT COURT HAS SPECIFICALLY MISLED A PARTY BY INCORRECTLY STATING THAT A PROPER APPEAL HAS BEEN PERFECTED..... 15

TABLE OF CONTENTS – Continued

Page

II. CERTIORARI SHOULD BE DENIED BECAUSE THE NINTH CIRCUIT'S DECISION IS CORRECT ON THE MERITS. LIABILITY UNDER TITLE VII IS FOCUSED ON THE EMPLOYER, AS OPPOSED TO FELLOW EMPLOYEES OR SUPERVISORS..... 19

A. THE STATUTE DOES NOT FIX LIABILITY ON "ANY PERSON," BUT RATHER, CONCENTRATES ON EMPLOYERS WHO FAIL TO PROVIDE EQUAL EMPLOYMENT OPPORTUNITY 19

B. HAD CONGRESS DESIRED TO ENACT A BROADER SWEEP OF LIABILITY, IT WOULD HAVE USED DIFFERENT LANGUAGE IN THE STATUTE 20

CONCLUSION 24

TABLE OF AUTHORITIES

Page

Cases

Baldwin County Welcome Center v. Brown, 466 US 147 (1984) 17

Barry v. Bowen, 825 F.2d 1324 (9th Cir. 1987) 15

Bender v. Williamsport Area School District, 475 US 534, 541, *rehearing denied*, 476 US 1132 (1986)....1, 18

Mohasco Corp. v. Silver, 447 US 807 (1980) 17

Osterneck v. Ernst & Whinney, 489 US 169 (1989) 15, 16, 17

Pavelic & Le Flore v. Marvel Entertainment Group, 493 US 120 (1989) 17

Thompson v. INS, 375 US 384 (1964) 15, 16

Torres v. Oakland Scavenger Co., 487 US 312 (1988) 17

Federal Statutes

42 USC § 1981a 4, 22

Title II of the Civil Rights Act of 1964

42 USC § 2000a-2..... 20

§ 2000a-3 (a) 21

Title VII (42 USC § 2000e, et seq)

42 USC § 2000e (b)..... 20

42 USC § 2000e-2 (a) 19

42 USC § 2000e-5 (b) 2, 21

TABLE OF AUTHORITIES – Continued

Page

§ 2000e-5 (f)(1) 3, 21

§ 2000e-5 (g) 3, 19

FEDERAL RULES

Federal Rules of Appellate Procedure

Rule 3.....1, 13

Rule 4.....2, 13, 14

Rule 26.....14

Federal Rules of Civil Procedure

Rule 6.....1, 14

Rule 44.....23

Rule 59.....14, 15

JURISDICTION

While respondents do not question the jurisdictional authority cited in the petition, they do wish to point out, and emphasize, that the court of appeals did not have proper jurisdiction to consider petitioner's appeal. Thus, while this Court has jurisdiction to consider the petition, the Court's proper role is limited to correcting the jurisdictional error of the court below. See, e.g., *Bender v. Williamsport Area School District*, 475 US 534, 541, *rehearing denied*, 476 US 1132 (1986).

STATUTORY PROVISIONS AND RULES INVOLVED

Rule 59 (b), (e) of the Federal Rules of Civil Procedure:

(b) A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(e) A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 6 (b) of the Federal Rules of Civil Procedure:

(b) When by these rules . . . an act is required or allowed to be done at or within a specified time, the court . . . may not extend the time for taking any action under Rules 50 (b), and (c)(2), 52 (b), 59 (b) and (e), 60 (b), and 74 (a), except to the extent and under conditions stated in them.

Rule 3 (a) of the Federal Rules of Appellate Procedure:

(a) An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing

a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 USC § 1292 (b) and appeals in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

Rule 4 (a) (1) and (4) of the Federal Rules of Appellate Procedure:

(a) (1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or other order appealed from. . . .

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: . . . (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. . . .

Title VII (in addition to the provisions cited in the petition) (emphasis added by Respondents):

42 USC § 2000e-5 (b):

When a charge is filed by or on behalf of a person claiming to be aggrieved . . . alleging that an *employer,*

employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining . . . has engaged in an unlawful employment practice. . . . the [Equal Employment Opportunity] Commission shall serve a notice of the charge (including the date, place, and circumstances of the alleged unlawful employment practice) on such *employer, employment agency, labor organization, or joint labor-management committee* (hereinafter referred to as *the "respondent"*) within ten days, and shall make an investigation thereof. . . .

42 USC § 2000e-5 (f)(1):

. . . . If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action . . . or the Commission has not entered a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall . . . notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against *the respondent named in the charge*. . . .

42 USC § 2000e-5 (g):

If the court finds that *the respondent* has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin *the respondent* from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or

without back pay (payable by the employer, employment agency, or labor organization, as the case may be responsible for the unlawful employment practice) or any other equitable relief as the court deems appropriate. . . .

42 USC § 1981a (a) (1), (b) (1), (3):

(a) (1) In an action brought by a complaining party under section 706 . . . of the Civil Rights Act of 1964 [Title VII] . . . against *a respondent* who engaged in unlawful intentional discrimination . . . and provided the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706 (g) of the Civil Rights Act of 1964 [42 USC § 2000e-5 (g)], from *the respondent*.

(b) (1) A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that *the respondent* engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(b) (3) The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party –

(A) in the case of *a respondent* who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of *a respondent* who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000;

(C) in the case of *a respondent* who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000;

(D) in the case of *a respondent* who has more than 500 in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

STATEMENT OF THE CASE

Petitioner is a former waitress who worked at Maxwell's Plum restaurant, located at Ghirardelli Square in San Francisco. The company that operated the restaurant, Maxwell's International, Inc., went into bankruptcy in 1983. The restaurant closed down in approximately 1987.

In this case, petitioner has not sued her employer, but rather, several individuals who also worked for Maxwell's International, Inc.

Petitioner's initial pleading was filed on April 24, 1987. It was virtually incomprehensible and respondents filed a motion to dismiss or, in the alternative, motion for more definite statement. Prior to the hearing on the

motion, petitioner filed a first amended complaint. It suffered from the same basic defects, and respondents renewed their motion. The motion was granted by the district court on July 25, 1989. Appendix G.[1]

Petitioner's second amended complaint was filed on September 20, 1989. Respondents made another motion to dismiss, which was granted on January 17, 1990. Appendix H. The district court (per Schwarzer, J.) court made the following observations:

> "[Petitioner] has created extraordinary difficulty for the Court by insisting on disregarding the Court's prior order concerning the form of her pleading and cluttering her complaint with pejorative, argumentative and irrelevant assertions and numerous citations to and quotations from legal authorities. . . . were it not for the fact that [petitioner] is appearing *pro se* (though apparently with legal assistance off stage), this action would be dismissed. With this order, the Court will give petitioner one more opportunity to file a complaint that passes muster. . . . "

Appendix H-1.

The district court then addressed the individual respondents' contention that Title VII does not impose

---

[1] "Appendix" references refer to the various documents attached to the Petition and this Response. Appendices A through J, inclusive are attached to the Petition. Appendices K and L are attached to this Response.

personal liability on them for back pay awards.[2] Respondents' contention was simple and straightforward: they were not petitioner's "employer," but rather, fellow employees who, along with petitioner, worked for a corporate entity. The court noted that the issue of individual liability is "shrouded in uncertainty." Appendix H-2. The court commented that "it is unlikely that Congress intended to impose personal liability on employees," but concluded, in the absence of definite guidance from the Ninth Circuit, "that it may be possible for petitioner to prove facts entitling her to relief and that therefore a complaint asserting individual liability for back pay cannot automatically be dismissed." Appendix H-3 & 4.

Judge Schwarzer admonished petitioner that "it will not do simply to allege conspiracies or generalized discriminatory practices." Appendix H-4. Petitioner was required to allege specific acts of intentional discrimination by specific people in order to proceed. The court also noted that even if such acts could be alleged, petitioner's settlement with her employer (she had received $24,000 from the bankruptcy proceedings involving Maxwell's Plum) would be an offset against any recovery in this action. Appendix H-4. The court specifically reminded petitioner that she could not recover compensatory or punitive damages under Title VII.

Petitioner's third amended complaint was filed on February 1, 1990. Appendix E. The case was assigned to the Honorable Vaughn R. Walker shortly thereafter.

---

[2] The pleading in this case occurred well prior to the 1991 amendments to Title VII, at a time when back pay was the only monetary relief available to petitioner under the statute.

On February 16, 1990, respondents moved to dismiss the complaint. The motion was heard by the court on April 20, 1990 and was granted on May 18, 1990. Appendix B. The district court dismissed petitioner's Title VII claims, in part, due to her failure to name the individual defendants as respondents in her EEOC charges. The court also concluded that petitioner had failed to state a claim upon which relief could be granted. Appendix B-9 & 10. The court specifically noted the prejudice to the individual respondents caused by petitioner's failing to put them on notice that they might be subject, years later, to a lawsuit seeking to impose personal liability. They were never advised of the need to gather evidence with which to defend themselves. See Appendix H-10.

The district court analyzed the allegations of the third amended complaint, which include the following:

Plaintiff alleges that she was employed by Maxwell's Plum restaurant starting in August 1982. Appendix E, ¶ 4 (further references to the third amended complaint are directly to individual paragraphs). Petitioner alleges that respondent Dino La Rosa ("La Rosa"), then General Manager of the restaurant, hired her as a hostess and promised that she would be promoted when a higher position became available. ¶¶ 35-36.

Plaintiff alleges that in the spring and summer of 1983, she managed the "Terrace Garden" breakfast room, although she claims to have been paid hostess wages for her work. ¶¶ 38-39. In the fall of 1983, petitioner began to complain to La Rosa and to respondent Carlo Galazzo

("Galazzo") that she believed she was being discriminated against. She alleges that respondents took no action to correct the situation. ¶ 40.

Petitioner alleges that in January 1984, La Rosa discriminated against her by reducing her hours. ¶ 13. Upon petitioner's request, the Hotel and Restaurant Employees & Bartenders Union ("Union") protested. *Ibid.* She contends that in the spring and summer of 1984, La Rosa and Galazzo retaliated by replacing her as hostess with two younger employees (¶ 16); reducing her hours (¶ 17); refusing to promote her to a front-of-the-house management position, or to a banquet director-trainee, denying culinary training that had been promised, writing false letters about her job performance, and otherwise harassing her. ¶¶ 14-19.

Petitioner further alleges that in May or June 1984, La Rosa and Galazzo made comments to her on several occasions that she was "too old" and would never be promoted because she was a woman. ¶¶ 21-24. She alleges that she filled-in as a dining room director several times a week, but was not paid managerial wages for her work. Some time in the summer of 1984, petitioner's Union again intervened on her behalf. She alleges that in July 1984, La Rosa terminated her because of her age and in retaliation for her request for Union intervention. ¶ 27.

The Union filed a grievance on petitioner's behalf, and in October of 1984 petitioner herself proceeded to file a charge with the Equal Employment Opportunity Commission ("EEOC"). A month later, she filed a separate charge with the National Labor Relations Board ("NLRB"). ¶ 28.

As a result of a Union arbitration on the grievance, petitioner was reinstated and awarded back pay. ¶ 28. With respect to the EEOC proceedings, petitioner asserts that in March of 1985, petitioners La Rosa and Huy Bui gave "false testimony" against her. ¶ 59.

Petitioner claims that the restaurant refused to honor the grievance arbitration award by delaying her return to work, and then by refusing to give her a full working schedule. ¶ 29. She claims that in October 1985, Galazzo threatened her that she would have a "hard time" if she remained at work. ¶¶ 30-31. On October 30, 1985, petitioner filed a second NLRB charge against the restaurant over the denial of a full schedule. ¶ 32. She contends that immediately upon receipt of this charge, and on November 8, 1985, petitioners Huy Bui and Don Bohn gave her written and verbal notice that she was being terminated again, and she claims that on the following day, petitioners Robert Stewart and Carlo Galazzo issued a formal termination notice. She further contends that Galazzo, Bui and Bohn refused to write letters of recommendation for her. She contends that these actions were taken in retaliation for her having filed the NLRB charge. ¶¶ 32-33.

Petitioner filed a second EEOC charge in November of 1985. The complaint does not specifically state what happened next, but it appears that petitioner was reinstated at the restaurant, as she alleges she was laid off again in January of 1986. ¶ 51. Petitioner alleges that after she requested her Union to intercede on her behalf, she was terminated for a third time on some unspecified date after March 17, 1986. ¶¶ 52-53.

Petitioner also contends that Galazzo informed a third party that she (Ms. Miller) was the owner of Maxwell's Plum restaurant, and that as a result the third party claimant sued her, instead of the restaurant, for back wages. ¶ 60.

Petitioner alleges that at a subsequent EEOC hearing, petitioners Stewart and Galazzo testified that they had implemented the final termination. ¶ 53. She further states that in the spring and summer of 1986, Galazzo denied her unemployment benefits (¶ 54) and that in January of 1987, petitioners Stewart, Bohn and Bui gave "false testimony" at an Unemployment Appeals Board hearing. ¶ 55.

The district court had ordered petitioner to attach copies of her EEOC charges to her amended pleading. Appendix G-2. She did not comply. The burden fell to the respondents to obtain and submit the EEOC records to the court. As an excerpt from those records reveals, the EEOC spent considerable time reviewing petitioner's claims, ultimately concluding that petitioner was not qualified for promotion. See Appendix L-10-11. On December 30, 1986, over two years after the filing of the original charge, the EEOC issued petitioner a right to sue letter, and this litigation followed.

REASONS FOR DENYING THE WRIT

Introduction

Respondents DINO LA ROSA, CARLO GALAZZO, DON BOHN, HUY D. BUI, ROBERT STEWART and DONALD SCHUPAK hereby oppose the petition for writ

of certiorari filed on behalf of Phyllis Miller, and they respectfully pray that the petition be denied.

At the outset, respondents note that this case involves a ring-wise, litigation savvy petitioner who has shown a remarkable ability to continually harass the individual respondents in this action. Despite filing incomprehensible pleadings (see, e.g,. Appendix G-2), petitioner has persisted in filing a "kitchen sink" complaint, in which she accuses virtually anyone who had anything to do with her at the former Maxwell's Plum restaurant of not only discriminating against her, but of giving "false testimony" (see Appendix E, ¶¶ 55, 59), inflicting emotional distress (¶¶ 57-66), defaming her (¶ 63), and tormenting her (¶ 21).

Even with her obvious energy and persistence, petitioner did not pursue the individual respondents in federal court until *after* she first: pursued arbitration under a collective bargaining agreement (Appendix E, ¶ 28); filed for unemployment benefits (Appendix E, ¶ 55); filed two EEOC charges (which did not identify these respondents as the parties complained against, see Appendix B 9-10); filed two NLRB charges (see Appendix E, ¶¶ 28, 32); and filed a state court lawsuit that languished untouched for three years, after which it was dismissed (see Appendix K). Moreover, petitioner did not proceed against these respondents until after she had reached a substantial monetary settlement with her employer in the bankruptcy court (Appendix F).

In short, the present claims are not being brought by a timid, *pro se* petitioner who does not know her way around a courtroom. Quite to the contrary, these charges

are being asserted by a crafty litigant who has seen fit to place her generalized woes before no less than eight different legal tribunals: (1) a Union arbitrator; (2) the California Unemployment Insurance Board; (3) the NLRB; (4) the EEOC; (5) the California Superior Court; (6) the United States District Court; (7) the Ninth Circuit, and now (8) the Supreme Court of the United States.

As we shall explain, it is time for this litigation free-for-all to come to an end.

I.

CERTIORARI SHOULD BE DENIED BECAUSE THERE IS NO JURISDICTION TO CONSIDER PETITIONER'S APPEAL.

A. PETITIONER DID NOT FILE A TIMELY NOTICE OF APPEAL PURSUANT TO FRAP 4. PETITIONER'S MOTION FOR RECONSIDERATION IN THE DISTRICT COURT, EVEN IF DEEMED A MOTION FOR NEW TRIAL UNDER FRCivP 59, WAS NOT TIMELY, AND THEREFORE DID NOT EXTEND OR ENLARGE THE TIME LIMIT FOR FILING A NOTICE OF APPEAL.

The judgment of the district court dismissing petitioner's third amended complaint was entered in the civil docket on May 23, 1990. Pursuant to Rules 3 (a) and 4 (a)(1) of the Federal Rules of Appellate Procedure (FRAP), petitioner was required to file a notice of appeal within thirty days. The final date for filing the notice of

appeal was June 22, 1990[3] Plaintiff did not file her notice of appeal until August 30, 1990, which was over two months late. See 991 F.2d at 585.

The only way the appellate filing deadline could have been extended was if petitioner had either: (a) filed a motion for extension of time under FRAP 4 (5), or (b) filed a *timely* motion for a new trial or a motion to amend the judgment pursuant to FRCivP 59. Petitioner did neither.

Instead, on June 4, 1990, petitioner filed a request for an extension of time to file a self-styled "motion for reconsideration" of the district court's order of dismissal. The district court granted the request, ordering that petitioner's motion be filed by June 26, 1990. Appendix I.

The district court did not have authority to grant the extension of time, for to the extent petitioner's motion for reconsideration was in essence a motion or a new trial under FRCivP 59, it had to be filed within 10 days of the entry of judgment. The district court has no jurisdiction to extend the 10 day filing period. See FRCivP 6 (b).

Consequently, as of June 22, 1990 (the filing deadline for the notice of appeal), petitioner had not perfected her appeal by filing the proper notice, nor had she filed a

---

[3] Calculation of the time period is governed by FRAP 26, which states that the "day of the act . . . from which the designated period of time begins to run shall not be included." Thus, the appellate filing deadline commenced to run on May 24th, the day after entry of judgment. The 30th day thereafter was June 22, 1990.

timely Rule 59 motion. As a result, she lost the right to appeal from the district court's judgment.

B. THE NINTH CIRCUIT MISAPPLIED THE "UNIQUE CIRCUMSTANCES" DOCTRINE OF *THOMPSON v. IMMIGRATION SERVICE*. PURSUANT TO *OSTERNECK v. ERNST & WHINNEY*, 489 US 169 (1989), A LATE NOTICE OF APPEAL IS EXCUSED ONLY WHERE THE DISTRICT COURT HAS SPECIFICALLY MISLED A PARTY BY INCORRECTLY STATING THAT A PROPER APPEAL HAS BEEN PERFECTED.

The Court of Appeals noted the jurisdictional problem, 991 F.2d at 585-586, but chose to avoid it by applying the "unique circumstances" doctrine of *Barry v. Bowen*, 825 F.2d 1324 (9th Cir. 1987), which is rooted in this Court's decision in *Thompson v. INS*, 375 US 384 (1964).

We respectfully suggest that the court's decision in this regard was error. As explained by this Court in *Osterneck v. Ernst & Whinney*, 489 US 169 (1989), the "unique circumstances" rule does not apply here. In *Osterneck*, the Court observed that:

> "Petitioners contend that the rationale of *Thompson* is applicable here because certain statements made by the District Court, as well as certain actions taken by the District Court, the District Court Clerk, and the Court of Appeals, led them to believe that their notice of appeal was timely. After reviewing these claims, the Court of Appeals declined to apply the *Thompson* exception, concluding: 'At no time has the district court or this court ever affirmatively

> represented to the Osternecks that their appeal was timely filed, nor did the Osternecks ever seek such assurance from either court.' "

489 US at 178-79.

As if to underscore the point, the Court went on to comment that the *Thompson* doctrine only applies:

> " . . . where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done. That is not the case here."

489 US at 179.

Because the Osternecks' notice of appeal was late, the circuit court did not have jurisdiction to consider the appeal, and it was dismissed. This Court affirmed the dismissal.

The present case should yield an identical result, for there was no timely filing of a notice of appeal, and there was no specific statement by either the district court or the court of appeals that misled petitioner into believing she had perfected her appeal. As *Osterneck* makes clear, the mere granting of the extension of time by the district court on June 4, 1990 does not meet the *Thompson* test; there must be a "specific assurance" by a judicial officer that an appeal had been perfected.

This jurisdictional thicket was duly noted by the Court of Appeals, which requested specific briefing on the point. Unfortunately, the court came to the incorrect

conclusion on the issue, as it failed to heed (or even cite) this Court's decision in *Osterneck*.[4]

The *Osterneck* rule is entirely correct. Courts have long noted that procedural rules should be applied mechanically, even if the result in a given case might seem arbitrary. *Pavelic & Le Flore v. Marvel Entertainment Group*, 493 US 120, 126 (1989) ("Our task is to apply the text, not to improve upon it."). "In the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of even nanded administration of the law." *Mohasco Corp. v. Silver*, 447 US 807, 826 (1980). Procedural requirements cannot be cast aside "out of a vague sympathy for particular litigants." *Baldwin County Welcome Center v. Brown*, 466 US 147, 152 (1984). These considerations are particularly true in cases involving jurisdictional rules. See, e.g., *Torres v. Oakland Scavenger Co.*, 487 US 312 (1988).

---

[4] The district court was well aware of the jurisdictional dilemma confronting petitioner on appeal. See Appendix J. The problem was not of the court's making, but of petitioner's making. That the district court chose to let petitioner off the jurisdictional hook, even for the best of motives, does not cure the problem, and in fact will lead to mischief in the future as parties will never be certain as to when the time limits expire, and when relief can be granted. As *Osterneck* makes clear, the proper solution to the problem is to apply the rules strictly, so everyone knows what must be filed, where it must be filed, and when it must be filed. The sole exception to the strict application of jurisdictional time limits is the unique and isolated case in which a court mistakenly says to a party "Don't worry. Your appeal has been perfected." It is only in that rare circumstance that this Court has permitted anotherwise tardy appeal to proceed.

> "Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto. See, e.g., *Marbury v. Madison*, 1 Cranch (5 US) 137, 173-180 (1803). For that reason, every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it. *Mitchell v. Maurer*, 293 US 237, 244 (1934). See *Juidice v. Vail*, 430 US 327, 331-332 (1977) (standing). 'And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit. *United States v. Corrick*, 298 US 435, 440 (1936) (footnotes omitted).' "
>
> *Bender v. Williamsport Area School District*, 475 US 534, 541, *rehearing denied*, 476 US 1132 (1986) (footnote omitted).

For these reasons, the petition should be denied, or in the alternative, granted and the court of appeals decision vacated on the ground that there was no jurisdiction to consider petitioner's appeal from the judgment of the district court.

II.

CERTIORARI SHOULD BE DENIED BECAUSE THE NINTH CIRCUIT'S DECISION IS CORRECT ON THE MERITS. LIABILITY UNDER TITLE VII IS FOCUSED ON THE EMPLOYER, AS OPPOSED TO FELLOW EMPLOYEES OR SUPERVISORS.

A. THE STATUTE DOES NOT FIX LIABILITY ON "ANY PERSON," BUT RATHER, CONCENTRATES ON EMPLOYERS WHO FAIL TO PROVIDE EQUAL EMPLOYMENT OPPORTUNITY.

At the time Title VII was enacted into law in 1964, the statute provided two types of remedies: injunctive relief and back pay. See 42 USC § 2000e-5 (g). Given the fact that the employing entity is the appropriate target of injunctive relief to correct employment conditions, coupled with the reality that only employers are responsible for compensation and benefits, it was altogether natural and fitting for Congress to fix liability on employers under Title VII.

Thus, Title VII makes it an unlawful employment practice for *an employer* to discriminate on the basis of race, color, religion, sex or national origin. 42 USC § 2000e-2 (a). And if illegal discrimination is found, the court may order *the employer* to reinstate the injured victim and provide back pay. 42 USC § 2000e-5 (g). Although these remedies are often imposed on an employer due to *respondeat superior* liability (i.e., in cases where one employee discriminates against another), that is a far cry from saying Congress intended the liability to flow to individual employees, in addition to the employing entity.

Petitioner argues that by defining the term "employer" to include the employer's "agents" (see 42 USC § 2000e (b)), Congress intended to impose such expansive liability. But that is a convoluted, twisted reading of the statute, and it is at odds with Congressional intent as expressed in the plain wording of Title VII. The statute speaks of *employer* liability, not the joint and several liability of employers and supervisory employees.

B. HAD CONGRESS DESIRED TO ENACT A BROADER SWEEP OF LIABILITY, IT WOULD HAVE USED DIFFERENT LANGUAGE IN THE STATUTE.

Had Congress intended to extend liability beyond the employing entity, it could have done so with simple, declarative words. For example, instead of using language to the effect that "the employer shall not discriminate in the workplace," Congress would have said "*no person* shall discriminate in the workplace." Had the latter formulation been chosen, there would be no question that liability embraced all persons, including supervisory employees, who participated in discriminatory conduct.

That Congress knew how to use such a verbal formula is beyond question, for in another portion of the statute, the drafters took care to state that "*no person* shall . . . deprive . . . any person of any right or privilege secured by [Title II dealing with public accommodations]." See 42 USC § 2000a-2. An action for preventive relief to correct discrimination in public accommodations

may be brought against *"any person"* violating the Act. See 42 USC § 2000a-3 (a).[5]

The portion of Title VII dealing with the filing of charges of discrimination further illustrates the point. In § 2000e-5, Congress provided that charges of discrimination may be filed against "an employer, employment agency, labor organization, or joint labor-management committee." 42 USC § 2000e-5 (b). If Congress intended for such charges to be filed against "any person," why not use those very words? Congress continues its deliberate approach to the problem by further stating that subsequent legal proceedings may be filed only against "the respondent named in the [EEOC] charge." 42 USC § 2000e-5 (f)(1). Once again, if Congress meant to open up the nation's courthouses for suits against "any person" violating Title VII, why not just say so?

The fact of the matter is that Congress intended to deal with job discrimination at its ultimate source, by making *employers* responsible to correct the problem. Even when the statute was amended in 1991, at which time the available relief was expanded to include general and punitive damages, the definition of "employer" was not changed, nor were any of the provisions of the above-referenced sections. All that happened was that the price

---

[5] By way of contrast, under Title VII, actions for relief may be brought only against "the respondent" named in the charge of discrimination filed with the EEOC. See 42 USC § 2000e-5 (f)(1). The administrative charge is where the claimant alleges that "an employer, employment agency, labor organization, or joint labor-management committee . . . has engaged in an unlawful employment practice. . . . " 42 USC § 2000e-5 (b).

tag for discrimination – a price tag that Congress has chosen to hang around the shoulders of employers – was raised substantially. See 42 USC § 1981a.[6]

We do not contend that Congress lacks the power to impose individual liability under Title VII. Our limited submission is that Congress has not done so. Any decision to alter the text of Title VII should be made in the national legislature, rather than in the chambers of this Court.

Because the Ninth Circuit's decision in this case is fundamentally correct and in keeping with the language of Title VII, it should be allowed to stand.

CONCLUSION

The present case involves a petitioner whose initial pleading was incomprehensible. See Appendix G-2. The case also involves a petitioner who has pursued remedies before state administrative tribunals (Appendix E-10 [¶¶ 54-55]), before the EEOC (*Ibid.*, ¶ 59), and before the NLRB (*Ibid.*, ¶ 31). In addition, before pursuing this litigation, petitioner filed a state court lawsuit, only to have it dismissed for lack of prosecution.[7]

---

[6] The Ninth Circuit noted that when Congress amended Title VII in 1991, it limited available damage remedies to the size of the employer. See 991 F.2d at 587 & n. 2. Had Congress envisioned individual liability, as opposed to *employer* liability, why would there be such limitations?

[7] The state court proceedings were placed before the district court via defendant's proof of official records, filed

In addition, petitioner settled her claims with her employer in bankruptcy court and received a substantial settlement, which is an offset against any potential recovery here. Appendix F, H-4.

Finally, this case involves a petitioner who did not suffer any substantial damages. Even if one assumes petitioner was discriminated against (which respondents dispute, of course), this case involves a restaurant that went out of business several years ago. At the time this case began in the district court, there was (and is) no ongoing job for petitioner to fill because the employer had ceased operations.

Even if the Court were to recognize a conflict between the Ninth Circuit's decision and others around the country, this case is not the proper vehicle for exploring such far reaching Title VII issues. This case should be allowed to die a natural death, which is what happened in 1990 when petitioner did not file a timely notice of appeal.

As we have shown, there is no jurisdiction for petitioner's appeal, and on that ground alone, the petition should be denied. Even if the Court reaches the merits of the Title VII issue, the Ninth Circuit's decision is correct and should be allowed to stand. Other decisions cited by petitioner, which distort Title VII beyond its plain meaning, should be disapproved. If Congress desires to provide for individual liability, all it needs to do is redraft the statute in simple terms and provide for such liability.

---

pursuant to FRCivP 44. A copy of defendants' filing is reproduced as Appendix K to this response.

To date, however, it has not done so, and the proper role for this Court is to adhere to the express language of the statute. Even if the Court disagrees with the Ninth Circuit's decision, given the jurisdictional flaw in the appeal, the correct procedure would be for this Court to vacate the decision below and remand for dismissal for lack of jurisdiction.

The petition should be DENIED.

Dated: January 5, 1994

ROBERT D. LINKS*
DOBBS, BERGER, MOLINARI,
VANNELLI, NADEL & LINKS
One Maritime Plaza, Suite 2500
San Francisco, CA 94111-3574
415-362-1940

Attorneys for Respondents

**Counsel of Record*

APPENDIX K

DOBBS, BERGER, MOLINARI,
CASALNUOVO, VANNELLI & NADEL
GARY P. VANNELLI
ROBERT D. LINKS
The Alcoa Building, Suite 2500
One Maritime Plaza
San Francisco, California 94111
Telephone: (415) 362-1940

Attorneys for Defendants
CARLO GALAZZO, DINO LA ROSA
DON BOHN, BUI DUC HUI,
ROBERT STEWART, and DONALD
SCHUPAK

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PHYLLIS MILLER,
Plaintiff,
v.
MAXWELL'S INTERNATIONAL, et al.,
Defendants.

(Filed June 20, 1989)

Case No.
C-87-1906 WWS

PROOF OF OFFICIAL RECORDS
(Certified Copies of Plaintiff's State Court Complaint and Orders Dismissing the Same)
(Fed. Rules. Civ. Proc. Rule 44.)

Date: July 21, 1989
Time: 11:00 a.m.
Place: Courtroom No. 9
19th Floor
U.S. Courthouse
450 Golden Gate Ave.
San Francisco, CA 94102

Pursuant to Rule 44 of the Federal Rules of Civil Procedure, defendants hereby present to the Court certified copies of the following documents, and offer them as proof of official records maintained by the Superior Court of California, In and For the City and County of San Francisco:

(1) Certified Copy of First Amended Complaint filed by Phyllis Miller, filed in the San Francisco Superior Court Action No. 842-195 on December 6, 1985;

(2) Certified Copy of order dismissing plaintiff's action;

(3) Certified Copy of order granting defendants' motion to reconsider order of dismissal (adding defendant MAXWELL's OF SAN FRANCISCO to earlier order).

Dated: June 20, 1989

Respectfully submitted,

DOBBS, BERGER, MOLINARI, CASALNUOVO, VANNELLI & NADEL

By /s/ Robert D. Links
ROBERT D. LINKS
Attorneys for Defendants CARLO GALAZZO, DINO LA ROSA, DON BOHN, BUI DUC HUI, ROBERT STEWART and DONALD SCHUPAK

PHYLLIS M. MILLER
640 Post Street, #405
San Francisco, California 94109
Telephone: (415) 441-5331

In Pro Per

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO

PHYLLIS M. MILLER, Plaintiff, vs. MAXWELL'S PLUM, a corporation, DINO LA ROSA, an individual, HUI BOI, an individual, DONALD SCHUPAK, an individual, CARLO GALAZZA, an individual, and DOES I-XXX, inclusive Defendants.	No. 842195 **FIRST AMENDED COMPLAINT FOR DAMAGES:** **WRONGFUL TERMINATION** **BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING** **NEGLIGENCE - FAILURE TO WARN** **INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS** **INTERFERENCE WITH CONTRACTUAL RELATIONS SEX AND AGE DISCRIMINATION** **RETALIATION**

Plaintiff alleges:

FIRST CAUSE OF ACTION WRONGFUL TERMINATION

(Filed Dec. 6, 1985)

1. This is a complaint by a discharged employee against her former employer for damages arising out of the termination of her employment.

2. Plaintiff PHYLLIS M. MILLER is a female resident of the State of California and the City and County of San Francisco. She was at all relevant times over the age of 40.

3. Defendant MAXWELL'S PLUM is a corporation with its principal place of business in San Francisco, California, Plaintiff is not certain of the exact title of this defendant and will amend if necessary to reflect the exact title.

4. Defendant DINO LA ROSA (hereinafter referred to as "LA ROSA") was at certain relevant times herein the manager of MAXWELL'S PLUM.

5. Plaintiff HUI BOI was at all relevant times employed by MAXWELL'S PLUM.

6. Defendant DONALD SCHUPAK (hereinafter referred to as "SCHUPAK") was at certain relevant times herein the manager of MAXWELL's PLUM.

7. Defendant CARLO GALAZZA (hereinafter referred to as "GALAZZA") was at certain relevant times herein Chief Executive Officer of MAXWELL's PLUM.

8. Plaintiff is informed and believes and thereon alleges that at all times mentioned herein the Defendants, and each of them, was the agent of the other in doing the things hereinafter alleged and was acting within the

course and scope of such agency with permission and consent of his or her co-Defendant.

9. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES I-XXX, inclusive, and therefore sues the Defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.

10. Following the occurrence of the acts of which she complains herein, plaintiff filed timely charges of employment discrimination with the United States Equal Employment Opportunity Commission and the California Department of Fair Employment & Housing (hereinafter "DFEH") against defendants.

11. On November 20, 1984, the DFEH issued notice of plaintiff's right to sue defendants within one year. This action was filed within one year thereafter.

12. Plaintiff was hired by defendant MAXWELL'S PLUM in August of 1982.

13. During the spring of 1983, Plaintiff managed a special breakfast room at defendant's San Francisco facility. That summer, she opened and managed defendant's Terrace Room. Plaintiff was told her work performance was excellent and her attendance record was unblemished.

14. Plaintiff was not paid managerial level wages for the work at that level which she performed, nor was she compensated for extra hours worked.

15. When a younger female employee wanted her schedule changed, defendants reduced plaintiff's hours.

16. Plaintiff performed the work of a Maitre d', but was denied promotion to this position when it became vacant. This position was filled by a man.

17. During the last two weeks of June, 1984, plaintiff did not work because of a personal absence. Plaintiff called defendant's daily during the first part of July to obtain her work schedule. Finally, in July, 1984, plaintiff was told she was terminated. Personal absences of male employees were typically accommodated by defendants.

18. Defendant LA ROSA commented to plaintiff that he "got rid" of her, that she was "too old", that she should "go home", and that she should "get married" and "get a husband to take care of you."

19. Plaintiff's treatment in this respect was far inferior to the treatment of similarly situated males under 40.

20. A substantial or motivating factor for defendants' treatment of plaintiff, as described above, was her sex and/or her age.

21. As a proximate result of the aforementioned wrongful acts of Defendants, and each of them, Plaintiff has been rendered unemployed, and has been unable to find comparable employment and has lost back wages and certain other employment benefits to be proven at trial.

22. The above said acts of Defendants constituted a wrongful termination of Plaintiff; such wrongful termination was a substantial factor in causing damage and injury to Plaintiff as set forth below.

23. As a result of the aforesaid acts of Defendants, Plaintiff has lost and will continue to lose income and

benefits, in an amount to be proven at time of trial. Plaintiff claims such amount as damages together with prejudgment interest pursuant to California Civil Code Section 3287 and/or any other provision of law providing for prejudgment interest.

24. As a result of the aforesaid acts of Defendants, Plaintiff has become mentally upset, distressed and aggravated. Plaintiff claims general damages for such mental distress and aggravation in an amount to be proven at trial.

25. Because the acts taken toward Plaintiff were carried out by Defendants acting in a deliberate, cold, callous and intentional manner in order to injure and damage Plaintiff, Plaintiff requests the assessment of punitive damages against Defendants, and each of them, in an amount to be proven at trial.

SECOND CAUSE OF ACTION RETALIATION

26. Plaintiff realleges and incorporates by reference each and every allegation set forth in Paragraphs 1 through 22 as though fully set forth herein.

27. On July 22, 1985, Arbitrator David A. Concepcion sustained plaintiff's grievance based on the foregoing facts and ruled that "Phyllis Miller was not discharged for just cause."

28. Though defendants agreed that Arbitrator Concepcion would retain jurisdiction over disputes regarding reinstatement, benefits, and back pay which were awarded, they thereafter repudiated his jurisdiction and

refused to submit to his authority, thereby forcing plaintiff to seek relief of this court.

29. Following plaintiff's reinstatement, defendants, including but not limited to defendants SCHUPAK and GALAZOO, embarked on a program of retaliatory acts designed to cause plaintiff mental and emotional strain, because she had successfully challenged their illegal activities.

30. The damage allegations of plaintiff 23 through 25 are incorporated by reference and for the purpose of this cause of action shall refer to acts which constitute retaliation in violation of applicable law.

THIRD CAUSE OF ACTION
BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING

31. Plaintiff realleges and incorporates by reference each and every allegation set forth in Paragraphs 1 through 30 as though fully set forth herein.

32. Plaintiff was employed by Defendant MAXWELL's PLUM under an oral contract of employment as modified by certain practices of Defendant MAXWELL'S PLUM. Plaintiff had a contract of employment for an indefinite term with MAXWELL'S PLUM. This indefinite term was to continue as long as Plaintiff performed her job in a satisfactory manner, and discharge, if any, would only be for good cause proven.

33. Into the relationship between Plaintiff and Defendant employer, the law of the State of California implied a covenant of good faith and fair dealing. This

covenant requires that each party to the employment contract act with fairness and good faith toward the other, and that neither party should take any action to prevent the other from reaping the benefits of the relationship. The covenant further required Defendant employer to refrain from heedless injury or damage toward Plaintiff.

34. The above said acts of Defendant employer MAXWELL'S PLUM constituted a breach of the covenant of good faith and fair dealing; said breach was a substantial factor in causing damage and injury to Plaintiff as set forth below.

35. The damage allegations of paragraphs 23 through 25 are incorporated by reference and for the purpose of this cause of action shall refer to acts which constitute a breach of the covenant of good faith and fair dealing.

FOURTH CAUSE OF ACTION
NEGLIGENCE – FAILURE TO WARN

36. Plaintiff realleges and incorporates by reference each and every allegation set forth in paragraphs 1 through 35 as though fully set forth herein.

37. Defendant MAXWELL'S PLUM also owed a duty to Plaintiff to deal with her fairly and in good faith. Defendant MAXWELL'S PLUM also owed a duty to Plaintiff to terminate her only for good cause. Defendant MAXWELL'S PLUM also owed a duty to warn Plaintiff if her work and conduct were inadequate or unacceptable so that Plaintiff would have an opportunity to correct

such inadequate or unacceptable work and conduct prior to Defendant's notice of termination to Plaintiff.

38. Defendants knew or should have known that Plaintiff's previous job performance had been adequate and that Plaintiff had no reason to fear for her job.

39. By failing to inform Plaintiff of any job performance deficiencies, and failing to inform Plaintiff that a risk of termination existed, Defendant MAXWELL'S PLUM breached its duty of reasonable care to Plaintiff and deprived Plaintiff of the opportunity of improving her job performance prior to his termination.

40. The above said acts constitute a breach of Defendant MAXWELL'S PLUM's duty of reasonable care to warn Plaintiff; such breach was a substantial factor in causing damage and injury to Plaintiff as set forth below.

41. The damage allegations of paragraphs 23 through 25 are incorporated by reference and for the purpose of this cause of action shall refer to acts which constitute negligence.

FIFTH CAUSE OF ACTION
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

42. Plaintiff realleges and incorporates by reference each and every allegation set forth in Paragraphs 36 through 41 as though fully set forth herein.

43. The foregoing conduct was extreme and outrages and an abuse of the authority and position of Defendants. Said conduct was intended to cause severe

emotional distress or was done in reckless disregard of the probability of causing such distress.

44. The foregoing conduct did in fact cause Plaintiff to suffer extreme emotional distress. As a proximate result of said conduct Plaintiff suffered embarrassment, anxiety, humiliation and emotional distress, and will continue to suffer said emotional distress in the future, in an amount according to proof.

45. Defendants committed the acts alleged herein maliciously, fraudulently and oppressively, with the wrongful intention of injuring Plaintiff, from an improper and evil motive amounting to malice, and in conscious disregard of Plaintiff's rights. Plaintiff is thus entitled to recover punitive damages from Defendants in an amount according to proof.

SIXTH CAUSE OF ACTION
NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

46. Plaintiff realleges and incorporates by reference each and every allegation set forth in Paragraphs 1 through 45 as though fully set forth herein.

47. Defendants knew, or should have known with the exercise of reasonable care, that the foregoing conduct would cause serious emotional distress to Plaintiff. As a proximate result of Defendants' negligent conduct, Plaintiff has suffered and continues to suffer embarrassment, mental anguish and emotional distress in an amount according to proof.

WHEREFORE, Plaintiff prays judgment as follows:

1. For reinstatement and full restitution of the employment rights;

2. For back pay in order to make Plaintiff whole for injuries sustained on account of Defendants' acts;

3. For front pay, to compensate Plaintiff for the future effects of Defendants' actions, in an amount subject to proof;

4. For compensatory and punitive damages in the amount of ten million dollars ($10,000,000.00);

5. Interest on all back pay and benefits awarded in an amount reflecting the rate of inflation, to make Plaintiff whole and to deter Defendants from engaging in such activity in the future;

6. Special damages according to proof;

7. Reasonable attorney's fees and costs of suit incurred herein; and

8. Such other and further relief as the court may deem proper.

DATED: December 6, 1985

/s/ Phyllis M. Miller
Phyllis M. Miller

[SEAL]

DOBBS, BERGER, MOLINARI,
CASALNUOVO, VANNELLI & NADEL
ROBERT D. LINKS
EDWARD W. SCOTT
One Maritime Plaza, Suite 2500
San Francisco, California 94111
Telephone: (415) 362-1940

Attorneys for Defendants
MAXWELL'S INTERNATIONAL, et al.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO

PHYLLIS MILLER, Plaintiff, v. MAXWELL'S INTERNATIONAL, et al., Defendants.	NO. 842-195 ORDER DISMISSING ACTION Date: April 5, 1989 Time: 9:30 a.m. Dept: 8, Law and Motion (Filed April 5, 1989)

On April 5, 1989, at the hour of 10:30 AM, the motion of defendants CARLO GALAZZO, HUI BOI, DINO LA ROSA, DONALD SCHUPAK & CO., INC., HORN & HARDART, INC., BRIGHT STAR HOLDING, INC., RUDY'S RESTAURANT GROUP, INC., DON BOHN, SAMURAI RESTAURANT INC., ALLISON BARBIARI, ROBERT STEWART and DONALD SCHUPAK, appearing specially, for an order dismissing the action, on the ground that plaintiff failed to serve process on the defendants within the mandatory three-year time period set forth in Sections 581.210, et seq., of the Code of Civil Procedure, came on regularly for hearing by the court.

Plaintiff, appearing in pro per, participated in the hearing by telephone; defendants appeared in court by and through their counsel of record, Howard W. Scott and Robert D. Links of the law firm of Dobbs, Berger, Molinari, Casalnuovo, Vannelli & Nadel.

The court having read and considered the papers filed in support of, and in opposition to, the motion; having heard and considered the arguments of plaintiff and defendants' counsel; and good cause being shown,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Defendants' motion is granted.

2. The court specifically finds that plaintiff failed to serve defendants with process within the mandatory three-year time period set forth in Code of Civil Procedure Sections 583.210, et seq.

3. Pursuant to Code of Civil Procedure Section 583.250 (b), the court orders that this action be dismissed.

4. Judgment shall be entered herein in favor of all defendants and against plaintiff. Counsel for defendants shall prepare an appropriate form of judgment and shall submit it to the court for approval, filing, and entry by the Clerk of the Court.

Dated: April 5, 1989

/s/ Stuart R. Pollak
JUDGE OF THE
SUPERIOR COURT
STUART R. POLLAK

[SEAL]

DOBBS, BERGER, MOLINARI,
CASALNUOVO, VANNELLI & NADEL
ROBERT D. LINKS
One Maritime Plaza, Suite 2500
San Francisco, California 94111
Telephone: (415) 362-1940

Attorneys for Defendants
MAXWELL'S INTERNATIONAL, et al.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO

PHYLLIS MILLER, Plaintiff, v. MAXWELL'S INTERNATIONAL, et al., Defendants.	NO. 842195 ORDER GRANTING MOTION TO RECONSIDER RULING, REGARDING MAXWELL'S OF SAN FRANCISCO Date: May 11, 1989 Time: 9:30 AM Dept: 8, Law and Motion (Filed May 24, 1989)

The court having received and reviewed defendants' motion to reconsider its April 5, 1989 ruling herein regarding MAXWELL'S OF SAN FRANCISCO, and having considered the arguments of counsel,

AND GOOD CAUSE APPEARING,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Defendants' motion to reconsider is granted.

2. The court's order herein, dated April 5, 1989, titled "Order Dismissing Action," is hereby amended to include defendant MAXWELL'S OF SAN FRANCISCO, and this action shall be dismissed without prejudice as to said defendant.

3. As stated in the April 5th order, counsel for defendants shall prepare an appropriate form of judgment.

Dated: 5/18/89

/s/ Stuart R. Pollak
JUDGE OF THE
SUPERIOR COURT

APPENDIX L

DOBBS, BERGER, MOLINARI,
CASALNUOVO, VANNELLI & NADEL
ROBERT D. LINKS
One Maritime Plaza, Suite 2500
San Francisco, California 94111
Telephone: (415) 362-1940

Attorneys for Defendants

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PHYLLIS MILLER, Plaintiff, v. MAXWELL'S INTER-NATIONAL, et al. Defendants.	No. C 87-1906 WWS DECLARATION OF ROBERT D. LINKS IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND, IN THE ALTERNATIVE, MOTION FOR A MORE DEFINITE STATEMENT Date: November 17, 1989 Time: 11:00 A.M. Place: Courtroom 9, 19th Floor Federal Courthouse 450 Golden Gate Avenue San Francisco, CA

(Filed Oct. 16, 1989)

The undersigned hereby declares:

1. My name is Robert D. Links and I have personal knowledge of the matters set forth in this declaration. If

called as a witness, I could and would testify voluntarily thereto.

2. I am one of the attorneys representing defendants in this litigation. On or about September 20, 1989, I received a copy of plaintiff's second amended complaint. There were no exhibits physically attached to the complaint, but it was included in a box of materials, approximately four and a half inches thick, which were unlabeled and bound in various volumes separate and apart from the amended pleading. The materials appear to be copies of documents obtained from EEOC files, although I am not at all certain of that fact. Among the documents I found the following, each of which is attached hereto in its entirety as an exhibit:

Exhibit A: Letter of complaint from customer, dated September 20, 1983, regarding offensive treatment by plaintiff Phyllis Miller and Maxwell Plum's reply thereto, dated September 23, 1983;

Exhibit B: Memorandum dated September 23, 1983 distributed by Maxwell's Plum to "Andre, Dino, Phyllis" regarding the above-referenced complaint;

Exhibit C: Follow-up memo to plaintiff, dated February 3, 1984 regarding ongoing customer complaints;

Exhibit D: Further memorandum dated April 20, 1984 to plaintiff regarding ongoing customer complaints; and;

Exhibit E: Letter to plaintiff from EEOC staff analysts, dated August 28, 1986, indicating that the commission has investigated plaintiff's claims and found them to be without merit.

3. Although I have reviewed the various documents in the box that contained plaintiff's amended pleading, it is all but impossible or [sic] me to determine precisely what her complaints are, other than her vague references to "wrongful termination," "retaliation," "perjury," and the like. Because I have found the amended complaint to be virtually indecipherable, it has been necessary for me to file this motion to dismiss and, in the alternative, for a more definite statement.

I hereby declare the foregoing is true and correct and that this declaration was executed under the penalty of perjury of the laws of the State of California at San Francisco, California on October 12, 1989.

By /s/ Robert D. Links
ROBERT D. LINKS

EXHIBIT "A"

2011 California Street #15A
Mountain View, CA 94040
September 20, 1983

Mr. Dino LaRosa, General Manager
MAXWELL'S PLUM
900 North Point
San Francisco, CA 94109

Per my telcon of this afternoon with Susan, I am writing you to complaint about the hostess (Phyllis) at Maxwell's Plum Restaurant at Ghirardelli Square.

On Monday, September 5th, two of us went to lunch at your restaurant. We asked the hostess how long until we could be seated, and were immediately lead [sic] to the courtside of the restaurant. We asked if we could be seated on the Bay side, and the hostess began telling us that it would be 'at least 20 minutes' before we could be seated. I told her that was fine and she kept responding that it would be 'at least 20 minutes', as though we would be discouraged at the wait. I again told her that would be fine and that we would wait in the bar, again she gave the "20 minute" response and I finally asked her if there were some reason she did not want to seat us. She hesitated, then stated that there was no reason only that she wanted to be sure we knew it would be 'at least 20 minutes.' She made it clear that we were not the caliber acceptable to Maxwell's Plum. I told her again we would wait in the bar and I gave her my name. We had no sooner gone the ten steps to the bar than she told us she had " . . . a little table in the corner that she could *squeeze* us in to." We were seated and given a menu – no wine list.

Our waiter and busboy had their job cut out for them as by now we were on the defense. Our waiter was very good (perhaps not as attentive) and it was busy. Our busboy was marvelous – he made us feel very welcome, and treated us as though his only concern was our needs. He saved the day.

During our lunch, we noticed that several (4 or 5) parties were seated, and did not like the seating they were given, and asked the hostess to please seat them elsewhere. The hostess, upon being approached about different seating stated that they had to talk to the maitre d (Andre) as it

was his decision, and she would walk off leaving the people standing in the middle of the restaurant.

After our lunch, we were in the ladies room (downstairs) discussing the offensive treatment we had received from the hostess, when two other women began telling us that they had received the same treatment and attitude. They said they would not return because they did not like being treated as though they hadn't the money or the breeding to eat at Maxwell's Plum. The other women were with men, so the treatment was not reserved for the unescorted females.

When I returned home that evening, I called the restaurant to air my complaint. I asked for the manager, and was given Andre, to whom I told my story. He assured me that after he had talked with her and gotten her side of the story that he would contact me. To this date I have not heard from anyone, however, it is possible that the effort was put forth and that I was not available.

My apologies Mr. LaRosa if I have upset your day, but my relaxing day in the City was almost ruined by an employee of Maxwell's Plum. It is very difficult to justify someone's attitude when indirectly you are being charged for their services, and her haughty attitude is more than any person should be asked to endure.

Yours very cordially,
/s/ Sherry Sojka
Sherry Sojka

MAXWELL'S PLUM

GHIRARDELLI SQUARE

SAN FRANCISCO, CALIFORNIA 94109
(415) 441-1161

September 23, 1983

Ms. Sherry Sojka
2011 California St. #15A
Mountain View, CA. 94040

Dear Ms. Sojka,

First of all I would like to thank you for taking the time to write to us in regards to your dining experience here on Labor Day. Your letter was very detailed and informative. We appreciate the effort you have made to completely inform us of the events which occured. [sic] It is only through such letters as yours that we are able to learn of instances where our customers have been dissatisfied with their dining experience at Maxwell's Plum.

I was most distressed to learn of the situation, particularly so as we pride ourselves in providing total customer satisfaction. I would like to assure you that I have spoken with both the restaurant director and the hostess to insure that this situation will not occur again.

Please accept my apologises [sic] for the inconvienence [sic] caused by our staff. I hope that you will give us another opportunity in the near future to show that we do indeed care about our guests and providing complete customer satisfaction. Please call me personally before your next visit so that I can be sure that you receive the best table and service possible.

Again, thank you for your phone call and letter and please accept my apolgises. [sic]

Sincerely,

/s/ Dino La Rosa
Dino La Rosa
General Manager

EXHIBIT "B"

MAXWELL'S PLUM

GHIRARDELLI SQUARE

SAN FRANCISCO, CALIFORNIA 94109
(415) 441-1161

MEMO: SEPTEMBER 23, 1983

TO: ANDRE, DENNIS, PHYLLIS

FROM: DINO

SUBJECT: HOSTESS APPEARANCE AND MANNER

On Tuesday, Sept. 20th we received a telephone call from a customer who complained very strongly about the manner and treatment which she received from the front desk hostess at lunch on Labor Day. The major complaint was that the hostess was rude and condescending and that she was made to feel very unwelcome at Maxwell's Plum. In addition, she also stated that she had heard several women in the ladies room discussing the hostess and her manner. These women apparently said that they would not return to Maxwell's again because of the hostess.

Another important factor is that the customer called and spoke with Andre about the situation later that evening. Apparently Andre informed her that he would look into the situation and get back to her . . . which did not occur.

I cannot tell you how important it is to follow through with these complaints. And above all to have a pleasant front door staffed with people who make our customers feel welcome. I would like to *stress that we are here to please our customers and not our customers to please us.*

EXHIBIT "C"

February 3, 1984

MEMO

To: Phylis [sic] Miller

From: Dino LaRosa

Re: Front Desk Manner

Recently, several clients/customers have brought to my attention the fact that you bring your personal life and business into matters that deal *strickly* [sic] with business matters concerning the restaurant.

When a client requests my attention, to see me, to talk with me, simply take the message in a courteous manner and any further dealings with that person will be handled by myself or another department head.

Your personal life and business should not in any way enter your professional working hours.

YOUR IMMEDIATE COOPERATION IS REQUESTED.

Thank you.

EXHIBIT "D"

April 20, 1984

MEMO

To: Phyllis Miller

From: Dino LaRosa

Re: Customer Complaint

Once again I have received a complaint by telephone regarding your attitude and manner of handling a customer (Tuesday April 17, Lunch).

Her initial complaint was about not receiving a window table when many were empty and she had a reservation. But, more importantly, she felt the manner in which she was dealt with by you was most rude, derogatory and unprofessional.

I cannot stress enough, the importance of your job – you are the initial contact customers have upon entering this establishment. If they are treated in such a manner as stated above, what kind of impression does this leave them with?

This serves as your final warning regarding your job performance.

cc: Huy
Mike Welch- Local 2
File

EXHIBIT "E"

U.S. Equal Employment Opportunity Commission

San Francisco District Office

August 28, 1986

10 United Nations Plaza
San Francisco, California 94102
Telephone 415- 556-7093

Ms. Phyllis Miller
6440 Wornall Rd.
Kansas City, MO 64113

Re: Charge Nos. 091850037 and 091860183
P. Miller v. Maxwell's Plum

Dear Ms. Miller:

This will confirm our telephone conversation this date wherein we discussed the Commission's processing of your cases. I specifically informed you that the Commission has completed its investigation of your cases and will be submitting to the District Director for a final determination. I also informed you that your cases were reviewed by a Committee comprised of myself, my supervisor, the Compliance Manager and two Senior trial attorneys. A consensus was reached that the evidence presented did not meet the legal requirements for a "cause" determination.

Regarding the promotion, the Committee concluded that you were not qualified for the position of Maitre D' by the standards set by Respondent. Therefore, your qualifications were not comparable to the others who were selected. Regarding the retaliation charge, the Committee concluded that your continually expressed dissatisfaction

with Respondent did not constitute a protest of discrimination as required by Title VII. Therefore, your discharge could not be shown to be retaliatory.

As we discussed, you will be submitting additional information for the District Director to consider. Please do so within the next five working days.

Sincerely,

/s/ Sandra Avila
Sandra Avila
Equal Opportunity Specialist

PROOF OF SERVICE BY MAIL
[CCP §1013A, 2015.5]

I, declare that:

I am employed in the City and County of San Francisco; I am over the age of eighteen years and not a party to the within cause; my business address is One Maritime Plaza, Suite 2500, San Francisco, California 94111-3574.

I am readily familiar with this office's practice for collection and processing of correspondence for mailing with the United States Postal Service.

On October 16, 1989, I served a true copy of the within **DECLARATION OF ROBERT D. LINKS IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND, IN THE ALTERNATIVE, MOTION FOR A MORE DEFINITE STATEMENT** on the parties in said cause by placing in a sealed envelope with postage thereon fully

prepaid, in the United States mail at San Francisco addressed as follows:

Phyllis Miller
6440 Wornall Road
Kansas City, Missouri 64113

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on October 16, 1989 at San Francisco, California.

/s/ Karen Greer
KAREN GREER